



Ninety – Sixth Legislature – First Session – 1999
Introducer's Statement of Intent
LB 550

Chairperson: Senator David M. Landis
Committee: Banking, Commerce, and Insurance
Date of Hearing: February 16, 1999

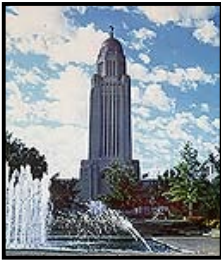
The following constitutes the reasons for this bill and the purposes which are sought to be accomplished thereby:

LB 550 would amend the Uniform Commercial Code (UCC) by repealing existing Article 9 (Secured Transactions) and replacing it with an all new Revised Article 9 as approved and recommended to the states by the National Conference of Commissioners on Uniform State Laws in 1998. Article 9 (revised and old) provides a statutory framework that governs secured transactions – transactions which involve the granting of credit secured by personal property.

The Uniform Commercial Code has eleven substantive articles. Article 9, Secured Transactions, may be the most important of the eleven. Article 9 provides the rules governing any transaction (other than a finance lease) that couples a debt with a creditor's interest in a debtor's personal property. If the debtor defaults, the creditor may repossess and sell the property (generally called collateral) to satisfy the debt. The creditor's interest is called a "security interest." Article 9 also covers certain kinds of sales that look like a grant of a security interest.

Article 9 operates with two key concepts: "attachment" and "perfection." These terms describe the two key events in the creation of a "security interest." Attachment generally occurs when the security interest is effective between the creditor and the debtor, and that usually happens when their agreement provides that it take place. Perfection occurs when the creditor establishes his or her "priority" in relation to other creditors of the debtor in the same collateral. The creditor with "priority" may use the collateral to satisfy the debtor's obligation when the debtor defaults before other creditors subsequent in priority may do so. Perfection occurs usually when a "financing statement" is filed in the appropriate public record. Generally, the first to file has the first priority, and so on.

Article 9 relies on the public record because it provides the means for creditors to determine if there is any security interest that precedes theirs – a notice function. A subsequent secured creditor cannot complain that his or her grant of credit was made in ignorance of the prior security interests easily found in the public record, and cannot complain of the priority of the prior interests as a result. Every secured creditor has a priority over any unsecured creditor.



Ninety – Sixth Legislature – First Session – 1999

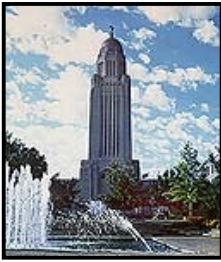
Introducer's Statement of Intent

Filing is not the only method for perfection. Much depends upon the kind of property that is collateral. Possession of collateral by the secured party is an alternative method of perfection for many kinds of collateral. For some kinds of property, control (a defined term) either perfects the interest or provides a better priority than filing does. There are kinds of transactions for which attachment is perfection. Priority is, also, not always a matter of perfecting a security interest first in time.

Scope. The 1998 revision expands the “scope” of Article 9. What this means is that the kinds of property in which a security interest can be taken by a creditor under Article 9 increases over those available in Article 9 before revision. Also, certain kinds of transactions that did not come under Article 9 before, now come under Article 9. These are some of the kinds of collateral that are included in Revised Article 9 that are not in original Article 9: sales of payment intangibles and promissory notes; security interests created by governmental debtors; health insurance receivables; consignments; and commercial tort claims. Nonpossessory, statutory agricultural liens come under Article 9 for determination of perfection and priority, generally the same as security interests come under it for those purposes.

Perfection. Filing a financing statement remains the dominant way to perfect a security interest in most kinds of property. It is clearer in Revised Article 9 that filing a financing statement will perfect a security interest, even if there is another method of perfection. “Control” is the method of perfection for letter of credit rights and deposit accounts, as well as for investment property. Control was available only to perfect security interests in investment property under old Article 9. A creditor has control when the debtor cannot transfer the property without the creditor’s consent. Possession, as an alternative method to filing a financing statement to perfect a security interest, is the only method for perfecting a security interest in money that is not proceeds of sale from property subject to a security interest.

Choice of Law. In interstate secured transactions, it is necessary to determine which state’s laws apply to perfection, the effect of perfection and the priority of security interests. It is particularly important to know where to file a financing statement. The 1998 revisions to Article 9 make two fundamental changes from old Article 9. In old Article 9, the basic rule chooses the law of the state in which the collateral is found as the law that governs perfection, effect of perfection, and a creditor’s priority. In Revised Article 9, the new rule chooses the state that is the location of the debtor. Further, if the debtor is an entity created by registration in a state, the location of the debtor is the location in which the entity is created by registration. If an entity is a corporation, for example, the location of the debtor is the state in which the corporate charter is filed or registered. In old Article 9, the entity that is a debtor is located in the state in which it has its chief executive office. These changes in basic choice of law rules will change the



Ninety – Sixth Legislature – First Session – 1999

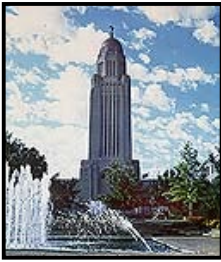
Introducer's Statement of Intent

place in which a financing statement is filed in a great many instances from the place it would have been filed under old Article 9. At the same time, the location of the debtor establishes a more certain place to perfect than the old rule does. Collateral shifts location much easier than the debtors do.

The Filing System. Improvements in the filing system in the 1998 revisions to Article 9 include a full commitment to centralized filing – one place in every state in which financing statements are filed, and a filing system that escorts filing from the world of filed documents to the world of electronic communications and records. Under Revised Article 9, the only local filing of financing statements occurs in the real estate records for fixtures. Fixtures are items of personal property that become physically part of the real estate, and are treated as part of the real estate until severed from it. It is anticipated that electronic filing of financing statements will replace the filing of paper. Paper filing of financing statements is already disappearing in many states, as Revised Article 9 becomes available. Revised Article 9 definitions and provisions allow this transition from paper to electronic filing without further revision of the law. Revised Article 9 makes filing office operations more ministerial than old Article 9 did. The office that files financing statements has no responsibility for the accuracy of information on the statements and is fully absolved from any liability for the contents of any statements received and filed. Financing statements may, therefore, be considerably simplified. There is no signature requirement, for example, for a financing statement. Nebraska has already begun its conversion from filings with the office of the county clerk to filings with the office of the Secretary of State with the enactment in 1998 of LB 1321 which becomes fully operative on July 1, 1999.

Default and Enforcement. Article 9 provisions on default and enforcement deal generally with the procedures for obtaining property in which a creditor has a security interest and selling it to satisfy the debt, when the debtor is in default. Normally, the creditor has the right to repossess the property. Revised Article 9 includes new rules dealing with “secondary” obligors (guarantors), new special rules for some of the new kinds of property subject to security interests, new rules for the interests of subordinate creditors with security interests in the same property, and new rules for aspects of enforcement when the debtor is a consumer debtor.

Statutory Liens. The bill would amend sections in Chapters 52 and 54 regarding statutory liens (generally agricultural in nature) in the least intrusive manner as possible. Holders of liens arising under these sections would still be required to proceed in the usual manner to establish their liens. In addition, Revised Article 9 would permit holders of nonpossessory statutory “agricultural liens” as defined in new UCC section 9-102 (a) (5) to file financing statements as secured parties in order to perfect agricultural liens



Ninety – Sixth Legislature – First Session – 1999

Introducer's Statement of Intent

under Article 9 in the same manner as security interests and thereby establish the priority of their liens in relation to other Article 9 security interests.

Operative Date. The uniform law commissioners have recommended to the states that they enact Revised Article 9 as soon as possible and provide for their enactments to become operative on July 1, 2001 simultaneously around the country. This approach will put Revised Article 9 in the statute books right away for all interested parties to see and study, and still provide an opportunity for any subsequent fine-tuning amendments to be made before the actual operative date arrives.

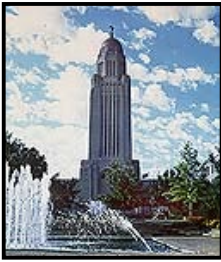
Nonuniform Provisions. LB 550 fills in blanks left by the uniform law commissioners for individual states to address. The bill also omits some uniform text and contains some nonuniform provisions. Following are significant examples:

1. Revised UCC section 9-102 (47) contains the definition of “instrument” for purposes of Article 9. The LB 550 version of this subdivision contains a nonuniform phrase: “including but not limited to, a writing that would otherwise qualify as a certificate of deposit (defined in subsection (j) of section 3-104) but for the fact that the writing contains a limitation on transfer.” This same nonuniform language was added to old UCC section 9-105 (l) (i) by LB 412 of 1997. LB 412 of 1997 was intended to clarify old Article 9 to ensure that a security interest in a certificated non-negotiable CD may be perfected by simply taking possession of the CD.

2. In the LB 550 version of revised UCC section 9-103, the phrase of uniform language “In a transaction other than a consumer-goods transaction” is deleted from the beginnings of subsections (e) and (f) in order to provide that these provisions apply to transactions involving consumer goods.

3. The LB 550 version of revised UCC section 9-201 (b) provides that a transaction subject to Revised Article 9 is subject to, among other things, “any other statute or regulation governing usury, small loans, retail installment sales, or the like.” The quoted language fills in a blank left by the uniform law commissioners and is taken from old UCC section 9-201.

4. The LB 550 version of revised UCC section 9-311 (a) (2) contains nonuniform language which fills in a blank left by the uniform law commissioners. The filing of a financing statement is not necessary or effective to perfect a security interest in property subject to state statutes identified in this subdivision. The language of this subdivision is based on language in old UCC section 9-302 (3).



Ninety – Sixth Legislature – First Session – 1999

Introducer's Statement of Intent

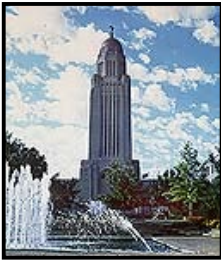
5. Revised UCC section 9-315 (a) (2) is nonuniform language substantially taken from a portion of old UCC section 9-306 (2) enacted by LB 974 of 1994. The 1994 addition was intended to eliminate the potential for an implied waiver, modification, release, or termination of a security interest in farm products in any case when the lender has either complied with the provisions of Nebraska's central filing system (effective financing statements) or when the buyer of farm products has been properly pre-notified pursuant to provisions of federal law.

6. The LB 550 version of revised UCC section 9-320 (a) contains a nonuniform sentence: "A buyer of farm products may be subject to a security interest under sections 52-1301 to 52-1321." This sentence was originally added to old UCC section 9-307 (l) by LB 1, Third Special Session, 1986. The LB 550 version of revised UCC section 9-320 also contains a nonuniform subsection: "(f) No buyer shall be allowed to take advantage of and apply the right of offset to defeat a priority established by any lien or security interest." These provisions were originally added to old UCC section 9-307 by LB 606 of 1985.

7. LB 550 omits uniform subsections (a) and (b) from revised UCC section 9-513. These provisions of the official text provide requirements for the secured party of record to file a termination statement in the case of a financing statement that covers consumer goods. The LB 550 version of this section would therefore provide requirements for the secured party of record to send a termination statement to the debtor without regard to whether the financing statement covers consumer goods. This will cause revised section 9-513 to follow the long-standing approach in this regard taken in old UCC section 9-404. The LB 550 version of revised UCC section 9-513 contains a nonuniform subsection: "(c) There is no fee for the filing of a termination statement." This nonuniform provision follows long-established tradition in old UCC section 9-403 (5) intended to avoid disincentives to the filing of termination statements.

8. The LB 550 version of revised UCC section 9-519 (a) provides filing office duties for filed records "including each record filed in a filing office pursuant to Chapter 52, article 2, 5, 7, 9, 10, 11, 12, or 14, Chapter 54, article 2, or Chapter 77, article 39". This nonuniform language contributes to the process of putting statutory liens into the centralized computer system. This follows the approach taken in old UCC section 9-414.

9. Revised UCC section 9-523 (f) (2) in LB 550 is nonuniform language which provides for filed records to be made available electronically through the gateway or electronic network. This nonuniform subdivision is based on nonuniform UCC section 1-111 enacted by LB 924 of 1998.



Ninety – Sixth Legislature – First Session – 1999

Introducer's Statement of Intent

10. Revised UCC section 9-525 provides for a fee schedule. The LB 550 version of this section is substantially rewritten to meet Nebraska needs and established practice.

11. The LB 550 version of revised UCC section 9-527 omits a requirement for the Secretary of State to prepare and file an annual report that includes a statement of how his or her filing-office rules are not in harmony with similar rules in other jurisdictions.

12. Revised UCC section 9-528 is a nonuniform section based on old UCC section 9-411, also a nonuniform section which provides duties for the Secretary of State regarding inquiries.

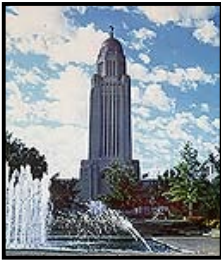
13. Revised UCC section 9-529 is a nonuniform section based on old UCC section 9-415, also a nonuniform section which provides for implementation of the centralized computer system.

14. Revised UCC section 9-530 is a nonuniform section based on old UCC section 9-414, also a nonuniform section which provides filing duties for the Secretary of State regarding security interests and statutory liens.

15. Revised UCC section 9-531 is a nonuniform section based on old UCC section 9-420, also a nonuniform section which provides for the Uniform Commercial Code Cash Fund and for inquiry and search duties for the Secretary of State.

16. Revised UCC section 9-611 provides for notification before deposition of collateral after default. Subdivision (c) (2) would require the secured party to send an authenticated notification of disposition to any secondary obligor. LB 550 provides a nonuniform exception so that there would be such a requirement “unless no security for the obligation or indebtedness was taken or contemplated at the time the secondary obligor became accountable in whole or in part for payment or other performance of the obligation”. These nonuniform provisions are substantially taken from nonuniform language in old UCC section 9-504 (8) as enacted by LB 221 of 1991.

17. The LB 550 version of revised UCC section 9-613 contains a nonuniform subdivision (5) and the LB 550 version of revised UCC section 9-614 contains a nonuniform subdivision (3), each of which provides: “In no event shall it be necessary for notification of disposition to refer to any guarantee agreement, to identify or designate the capacity in which a debtor or secondary obligor is being sent such notification, or to identify or designate the capacity in which the debtor or secondary obligor may be liable for any deficiency existing after sale or disposition of collateral.” These nonuniform



Ninety – Sixth Legislature – First Session – 1999

Introducer's Statement of Intent

provisions are taken substantially from old UCC section 9-504 (6) as enacted by LB 221 of 1991.

18. The official text of revised UCC section 9-625 (e) and (f) provides in certain cases of a secured party's failure to comply with Revised Article 9 for a recovery of "\$500" in addition to any damages. LB 550 changes both of these occurrences of "\$500" to "reasonable attorney's fees and court costs". This approach is in keeping with amendments to old UCC section 9-404 (l) by LB 943 of 1988.

19. Revised UCC sections 9-701 to 9-708 provide for transition rules. LB 550 makes changes in the official texts such as substituting "becomes operative" for "takes effect." This is done to recognize that LB 550 would become law on its operative date (July 1, 2001) rather than on its effective date (three months following adjournment of the 1999 legislative session).

20. Revised UCC section 9-709 is a nonuniform section based on old UCC section 9-412, also a nonuniform section which provides for treatment of financing statements filed prior to July 1, 1999.

Principal Introducer:

Senator David M. Landis